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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 997.

CATHERINE SHIELDS ET ALS., PLAINTIFFS IN ERROR,

versus

ARTHUR SHIFF, DEFENDANT IN ERROR.

ON THE MOTION TO DISMISS.

Brief of Plaintiffs in Error, in Opposition to the Motion.

GUS. A. BREAUX,
Of Counsel for Plaintiff in Error.

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The claimants are the nearest of kin to Eustace Surget, who died without leaving descendants.

As such they claim the property in controversy, under the act of Congress of 1862, commonly known as the Confiscation Act, and the resolution of the same body explanatory thereof, for that, say they, the said property was libelled and condemned and sold under decree of the proper court; the proceedings having been instituted because Eustace Surget, the owner, was an offender against the United States, rendering his property liable to condemnation and sale under said act.

The relationship, condemnation and sale, the possession of the property by the defendant, and the death of Surget, are conceded upon the record and evidence.

For answer to the claim, it is averred, first, that

Surget left a will, instituting his wife as universal legatee: that the claimants consequently, though next of kin, cannot take the property under the reservation of the statute of 1862, as explained by the resolution of Congress.

2d. That, even if these claimants could take the confiscated property of Surget at his death, in the instant case, they are debarred from so doing, because, at the time of, and prior to the condemnation sale, the property was affected with a mortgage, which was subsequently foreclosed, the defendant becoming the purchaser at such foreclosure and sale and thus obtaining perfect title against the world.

This broader question, subdivides into several corollary questions, one of which necessarily is, as to where the fee to the property resided during the lifetime of Surget, after the condemnation sale; for upon the solution of that question depends the validity of the proceedings, in foreclosure: another is, in whose favor is the constitutional and statutory reservation made? Is it in favor of the heir of blood; or in favor of the devisee or legatee?

A third question is, whether the next of kin or heir takes from the government or whether he takes from the offender: for if the latter have the power of will over the property, or in other words may institute a devisee to take it, the property is subject to his control, notwithstanding condemnation and confiscation.

These are surely federal questions; they seek the interpretation of a United States statute—one which

has given the Court great concern: they are so omnipresent, so inseparably intertwined with the consideration of any question raised in every aspect of the case, that it is utterly impossible to consider any of them whether of State law and practice arising herein, without their playing their full part.

It is certain, and will not be denied, we think, that the instant suit was brought to enforce rights, which, if they exist at all, are derived from the Act of Congress of July 17th, 1862; it is not easy to conceive of any issue made in such a case, which does not, in some mode, involve the construction of that statute, or the application of some of its provisions.

Now the question presented at the very treshold of this cause is: have the nearest of kin, under the statute of the United States, the right to stand in judgment for the claim of confiscated property, after the death of the offender, to the exclusion of the legatee or devisee instituted by his will?

Like a question of jurisdiction, it is one which is necessarily in the case, and must be adjudged, before passing to others—for if the claimants have no standing in Court, it is no concern of theirs what becomes of the property—there their pursuit ends.

Should the Court give them the standing in Court to which they believe the law entitles them, then the question arises: are the proceedings in foreclosure conclusive against them?

The facts are that these proceedings were instituted only in August, 1880. Record, p. 56.

They were proceedings *in rem*, directed against Eustace Surget, who was then in Europe, upon promissory notes on which the last payment was made May 17th, 1865, as appears by the petition; the mortgage secured to Shiff was recorded 30th January, 1860, and is shown by the certificate of the mortgage office not to have been re-recorded until the 2d day of April, 1879. Transcript, p. 25.

Under the laws of Louisiana, under this state of facts, the debt and mortgage being both prescribed, were without effect against the property, as to third persons, and no proceedings could be taken, with or without the consent of the original obligee (and the facts of the case leave no doubt that this was a consent proceeding,) which could by any possibility, disturb or affect the rights of third persons in the property.

(See authorities). C. C. 3367; 33 Annual, 708; 34 Annual, 1043.

The State Court has decided that to enforce a pretended right upon property which has passed into other hands, the claim must be a valid subsisting claim and right, and not a prescribed one. 33 Annual, 708; 34 Annual, 1043.

It is obvious, therefore, that the Court must first decide where the fee in the property resided at the time of the attempted foreclosure; if in Surget, then the foreclosure is good, because, as to him, there was no need of re-inscription. But if the claim was prescribed, and the recordation of the mortgage ceased to have any effect, and the fee resided in the government or was in

the heir with a suspensive condition, then the owner of the fee must be before the Court if his interest is to be affected by the proceedings of foreclosure.

The Court must then decide, under the Federal statute whether the plaintiffs take title under Surget or through the Government; in other words, whether Surget had a transmissible interest in the property, which his heirs, as such, inherited from him and through him. How could he have such transmissible interest in the face of the many decisions of this Court that his entire interest in the property was divested by the condemnation and sale?

Again, the claim and mortgage having lapsed under the laws of the State, any action on the debt was a mere personal action against Surget, who, it may be conceded, had the right to plead prescription or not at pleasure; but no plea or want of plea in any action against him, could revive lapsed rights, against property which had passed out of his possession, and upon which other and opposing rights had been acquired. Hence, in determining even this question, which is claimed to be not a Federal one, it is indispensable to decide under the law of 1862, what had become of the fee to the property under its condemnation and sale. Obviously these cannot be separated any more than in a syllogism a conclusion can be separated from a premise.

Again, it is said, that "it has never been supposed that we should inquire of any act of Congress to ascertain who are to take an estate by succession from a

ADDENDA.

C. C. 3369. The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscription have not been renewed before the expiration of this time, in the manner in which they were first made.

C. C. 3540. Action on * * notes payable to order or bearer * * * and those on all promissory notes, whether negotiable or not, are prescribed by five years.